LIBRARY
SUPREME COURT, U. S.

No. [illegible]

Supreme Court, U.S.
FILED
MAY 25 1971
E. ROBERT SEAVER, C

In the Supreme Court of the United States

OCTOBER TERM, 1970

70-29

JOHN GIGLIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,

WILL WILSON,
Assistant Attorney General,

JEROME M. FEIT,
Assistant to the Solicitor General,

[illegible],
[illegible],
Attorneys,
Department of Justice,
Washington, D. C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement:	
A. The Trial	2
B. The Motion for a New Trial	6
Summary of argument	9
Argument:	
Petitioner is not entitled to a new trial on the ground that there was an undisclosed promise of immunity	11
A. Taliento's asserted belief that he could be prosecuted was not misrepresented	11
B. The 1966 promise—assuming there was one—was not sufficiently material to call for a new trial	15
Conclusion	20

CITATIONS

Cases:

Brady v. *Maryland*, 373 U.S. 83	16
Giles v. *Maryland*, 386 U.S. 66	18
Hawkins v. *United States*, 324 F. 2d 873	17
Kyle v. *United States*, 297 F. 2d 507	15
Mooney v. *Holohan*, 294 U.S. 103	15
Napue v. *Illinois*, 360 U.S. 264	15
United States v. *Alexander*, 430 F. 2d 904	18

Cases—Continued	Page
United States v. *Bonnano*, 430 F. 2d 1060	15
United States v. *Cousins*, 429 F. 2d 1271, certiorari denied, 400 U.S. 904	18
United States v. *Davila*, 428 F. 2d 465	20
United States v. *De Marie*, 261 F. 2d 477	18
United States v. *Faustin*, 371 F. 2d 820, certiorari denied, 387 U.S. 935	18
United States ex rel. Fein v. *Deegan*, 410 F. 2d 13, certiorari denied, 395 U.S. 935	19
United States v. *Johnson*, 327 U.S. 106	19
United States v. *Keogh*, 391 F. 2d 138	17
United States v. *Luxenberg*, 374 F. 2d 241	18
United States v. *McWilliams*, 421 F. 2d 1033, certiorari denied, 397 U.S. 1070	18
United States v. *Perea*, 413 F. 2d 65, certiorari denied, 397 U.S. 945	18
United States v. *Polisi*, 416 F. 2d 573	16
United States v. *Tomaiolo*, 378 F. 2d 26	18
Statutes:	
18 U.S.C. 371	2
18 U.S.C. 2314	2
18 U.S.C. 4208(a)	2
Miscellaneous:	
Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 Yale L. J. 136	16

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 892

JOHN GIGLIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The court of appeals affirmed without opinion (A. 156-157).

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1970. The petition for a writ of certiorari was filed on October 23, 1970, and granted on March 1, 1971. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in the circumstances of this case evidence of an alleged promise of immunity made to a government witness requires the granting of a new trial.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of transporting forged money orders in interstate commerce in violation of 18 U.S.C. 2314 (counts one and two) and of conspiracy in connection therewith in violation of 18 U.S.C. 371 (count four) (A. 5-8).[1] He was sentenced to five years' imprisonment on each count with the sentences on counts two and four to run concurrently, subject to the parole eligibility provisions of 18 U.S.C. 4208(a). Petitioner was given a five-year consecutive sentence on count two, but that sentence was suspended (A. 154).

A. The Trial

1. The evidence adduced by the government at trial (the defense submitted no evidence) showed that petitioner's scheme began in June 1966. The co-conspirator, who was not indicted, was Robert Taliento, who at that time was a nineteen-year-old teller in a Brooklyn bank. The plan was for Taliento to cash stolen Travellers' Express money orders given

[1] At the close of the government's case, the trial court granted the defense motion to dismiss count three (A. 6; Tr. 211).

to him by petitioner (A. 18-21, 23, 71; Tr. 180-182).[2] These money orders, which had moved in interstate commerce, were endorsed with the forged signature of a regular customer at the bank (A. 13, 19-20).

Taliento testified as a government witness that, on the evening of June 26, 1966, petitioner had given him $2,300 in forged money orders and that he cashed them at his bank the following day. That night he gave the money to petitioner and received $500 in return (A. 23-26). That same evening, petitioner gave Taliento additional forged money orders to cash (A. 27-28) and Taliento cashed them the next day (A. 30). That evening, June 28, 1966, he delivered the proceeds ($2,100) to petitioner and again received $500 (A. 31-33). Taliento thereafter met with petitioner on the evening of July 4. When petitioner said "he had a few more checks to cash," Taliento told him that he should come to the bank (A. 33). The following morning, petitioner brought the money orders—worth $3,000—to the bank and Taliento cashed them (A. 33-34).

Later that day bank authorities became aware of the earlier unlawful transactions and confronted Taliento, who divulged petitioner's role in the scheme and admitted his own complicity (see A. 65-68, 69, 100; Tr. 29, 192-193). The F.B.I. was called and that same evening obtained Taliento's cooperation in apprehending petitioner (A. 35;[3] Tr. 185-186). At

---

[2] "A." refers to the Appendix and "Tr." to the trial transcript which is on file with the Clerk. We are also lodging the grand jury transcript.

[3] The appendix contains an obvious misprint in referring to the F.B.I. meeting with Taliento as having occurred on July 5, 1968, rather than July 5, 1966.

the agents' request, Taliento telephoned petitioner and arranged that their meeting scheduled for 10:00 that evening be rescheduled for 11:00 p.m. (Tr. 185-186). This meeting was watched by federal authorities, who interrupted it to arrest petitioner. He had $550 wrapped in a rubber band on his person (Tr. 188, 198) but denied that this money belonged to him (Tr. 199).

2. At trial, Taliento was closely cross-examined on a variety of subjects,[4] including the question whether any promises had been made to him by the government in exchange for his testimony (A. 43-52). When confronted with his grand jury testimony that he wanted to help himself (Grand Jury Tr. 26), Taliento retracted his earlier statement that he testified before the grand jury solely because he was subpoenaed (A. 45-46). He denied that any statements he had made to bank officials or to the F.B.I. in early July 1966 were in exchange for a promise of leniency (A. 48, 101). There was, he stated, no discussion along such lines on those occasions (A. 48).

Taliento further testified on cross-examination that, at the time of trial, he had not been charged with any crime, and that about a week prior to trial he had been at the United States Attorney's office and that the Assistant United States Attorney who tried the case (Carl Golden), an F.B.I. agent and his own

---

[4] This included repeated attempts to impeach his credibility by pointing to certain differences between his trial testimony and earlier statements he had made to bank authorities, the F.B.I. and the grand jury (see *e.g.*, A. 88-91, 67-69, 71-72, 85-86).

attorney told him that if he did not testify at trial he could be indicted. He stated that he was not told that if he did testify he would not be prosecuted, and believed he still could be tried (A. 43-44, 51-52).

In closing argument, defense counsel emphasized to the jury how much the government's case rested upon Taliento's testimony (*e.g.*, Tr. 220, 234), and he devoted the major portion of his summation to an attack on Taliento's credibility, strenuously urging that Taliento was not worthy of belief (*e.g.*, Tr. 221-223, 227, 231). Counsel asserted, *inter alia*, that Taliento was simply testifying "to help himself"; that he was a "liar"; and at one point characterized him as a "cornered rat" who was "looking for any way to hang anybody to save" himself (Tr. 232-233; see also A. 133-135). In his summation, government counsel advised the jury that Taliento had "received no promises that he would not be indicted" (Tr. 255-256).

In its instructions the trial court stated that the members of the jury were "the sole judges of the credibility of the testimony of all witnesses and the weight and effect of all the evidence" (Tr. 269; see also Tr. 265-272). It was further pointed out that Taliento was by his own testimony an accomplice; the court advised that, while such status did not mean that Taliento could not be believed, it did mean that his testimony had to be examined and weighed "with great caution and care * * *" (Tr. 282). The jury returned a guilty verdict in August 1968 and the court of appeals affirmed in May 1969 (A. 123-124).

B. The Motion for a New Trial

1. In July 1969—some eleven months after the conclusion of the trial—petitioner made a motion for a new trial on account of newly discovered evidence. The motion was supported by an affidavit of counsel to the effect that after the briefs had been filed in the court of appeals, he was advised by Anthony Di Paola, an Assistant United States Attorney for the Eastern District of New York, that on September 20, 1966 (almost two years before the trial), Di Paola had expressly promised Taliento that he would not be indicted if he testified before the grand jury against petitioner. The thrust of counsel's motion was that the government had the obligation to advise the defense of this fact at trial, and its failure to have done so required a new trial (A. 128, see A. 123-128).

The government submitted affidavits in response. Mr. Di Paola, who had handled this case before the grand jury in September 1966, stated in his affidavit that sometime after the arraignment of petitioner and Taliento on July 6, 1966, he had conferred with Taliento and the latter's counsel, that it had been agreed at this conference that if Taliento would testify before the grand jury as a government witness he would not be indicted, and that it was further agreed that if Taliento eventually testified as a government witness at trial he would not be prosecuted, but that if he did not testify he would be prosecuted (A. 136-137).

Mr. Golden, the Assistant who subsequently took over the case and actually tried it, also submitted an affidavit on behalf of the government (A. 138-141).

He stated that on August 6, 1968, the day after he was assigned petitioner's case and three days before the trial began, he discussed the case with Mr. Di Paola who advised him that Taliento "had not been granted immunity" but had not been indicted because he "was very young at the time of the alleged occurrence and obviously had been overreached" by petitioner (A. 139). Mr. Golden could not reach Taliento that day, and again discussed the matter with Mr. Di Paola. The latter stated he thought Taliento would be cooperative but, if he was not, he was still subject to indictment (A. 140).

On August 7, Golden was able to reach Taliento and, on that date, had an interview with him and his father. When confronted with the statements he had given at the bank on July 5, 1966, Taliento "claimed he had a loss of memory." (A. 140). Mr. Golden reminded Taliento that he had not been granted immunity and arranged a further conference later that afternoon which was attended by Taliento, the latter's father and the United States Attorney, Joseph Hoey. Both Messrs. Golden and Hoey stated in their affidavits that at this meeting Mr. Hoey told Taliento that if he refused to testify, he would be indicted (A. 140-141).[5] Taliento and his father were advised to confer with the attorney who had represented Taliento at the time of his grand jury appearance in September 1966 (A. 141). Mr. Hoey notified that attorney and explained the situation to him (A. 143).

[5] Mr. Hoey's affidavit stated that Taliento was informed at this time that he "could and should have been indicted as a co-defendant with GIGLIO" (A. 143).

Later that afternoon, the Talientos, accompanied by the attorney, returned and met with Mr. Hoey (A. 141). They were advised that Taliento had not been granted immunity and that if he refused to testify he would be indicted (A. 141). At that time, Taliento's counsel made no claim that his client had ever "received immunity or was made any promises" (A. 143-144). According to Mr. Hoey, at this meeting "[n]o assurances were given to [counsel] or to the Talientos except that they would have to rely on the good judgment and conscience of the Government" (A. 144). The next day, after conferring with counsel, Taliento agreed to testify as a government witness (A. 141).

2. The district court denied the motion for a new trial (A. 149-152). It found that the testimony of Taliento was elicited, "not under a grant of immunity from the prosecution, but after consultation with Mr. Joseph Hoey, United States Attorney—the only person who could authorize the grant of immunity—and advice that he (Taliento) could and would be prosecuted if he did not testify" (A. 151-152). The court pointed out that the relevant facts were all before the jury—namely, that Taliento was an accomplice who had not to the date of trial been indicted and that Taliento still believed he could be prosecuted—and that his personal stake in the case was vigorously commented upon by petitioner's trial counsel. The court concluded that "[n]othing was left unsaid" and that in these circumstances it was "inconceivable [that] the result would or should be changed" (A. 152).

The court of appeals affirmed without opinion (A. 156-157).

SUMMARY OF ARGUMENT

Petitioner's basic assertion is that Taliento lied when he testified that he had received no promise of immunity from the government in exchange for his testimony and that accordingly he is entitled to a new trial. The fallacy of this argument is that it rests solely on what an Assistant United States Attorney assertedly advised Taliento in 1966, some two years before trial, and wholly overlooks the critical events occurring just prior to trial. These later events —the meetings with the United States Attorney and the Assistant United States Attorney who actually tried the case—make it manifest that neither Taliento nor his attorney was under any impression that Taliento had any immunity. On the contrary, Mr. Hoey, the United States Attorney, made explicit that if Taliento testified as a government witness he "would have to rely on the good judgment and conscience of the government" (A. 143-144). Neither Taliento nor his counsel took exception to that statement. It is clear therefore that Taliento testified honestly when he said on cross-examination that there was "still a chance" he could be prosecuted (A. 44). By the same token, neither the United States Attorney nor Mr. Golden, the Assistant who tried the case, was proceeding upon any other understanding; there was thus neither perjury nor prosecutorial suppression of evidence.

The precise question in this case therefore reduces itself to whether, taking Mr. Di Paola's statement on its face, there is enough here to require a new trial. Under traditional standards there are no sufficient grounds for a new trial because the evidence would not likely have produced an acquittal if it had been admitted at trial.

The substantive evidence in the case was unaffected by the 1966 promise. Particularly critical were Taliento's confessions directly implicating petitioner, which were made before the alleged promise of immunity and thus were in no way affected by it. Moreover, few would contend that the jury, which was made fully aware of Taliento's involvement in the scheme and the fact that he had nevertheless not been indicted, would have been influenced by the admission of the 1966 promise. There remains no inconsistency between the jury's belief that Taliento and Assistant United States Attorney Golden truthfully represented that no promise of immunity had been made—which was in fact the truth in light of the pretrial events—and a simultaneous belief that the government would weigh any helpful testimony heavily in its subsequent decision whether or not to prosecute Taliento.

ARGUMENT

Petitioner Is Not Entitled To A New Trial On The Ground That There Was An Undisclosed Promise Of Immunity.

A. *Taliento's asserted belief that he could be prosecuted was not misrepresented.*

The core of petitioner's argument is that he is entitled to a new trial because the government failed to disclose that its key witness had "perjuriously denied" (Pet. Br. 12) that he had received a promise of immunity for his testimony. But the crucial premise of this contention is not supported by the facts of this case. The assertion that immunity had been promised rests entirely on Mr. Di Paola's affidavit concerning his memory of his conversation with Taliento and the latter's attorney in 1966; it wholly overlooks, however, the more critical events occurring during the week before the trial, some two years later. When these 1968 events are examined it is clear, we submit, that Taliento did not falsify the facts either knowingly or even inadvertently when he testified that he had not been promised immunity from indictment or prosecution by the government.

It is undenied that the assistant who tried the case, Mr. Golden, was not aware of any 1966 promise—a promise which, it should be noted, was not in writing or otherwise reflected in the government files. Indeed, Mr. Golden's affidavit unequivocally states that shortly before the 1968 trial, Mr. Di Paola had told him that Taliento had not been given immunity, and that the reason he had not been indicted together with Giglio was because of his youth and the feeling that

he had been "overreached" by petitioner (A. 139). The meetings which took place shortly thereafter reflect the correctness of the understanding of government trial counsel—as well as Taliento—that there was no assurance of immunity.

When Taliento indicated shortly before trial that he did not want to testify, due to an alleged loss of memory (A. 140), the United States Attorney, Joseph Hoey, in a conference with Carl Golden, Taliento, and the latter's counsel, told Taliento that he could still be indicted (A. 140-141). Neither Taliento nor his attorney made any mention of any earlier promise of immunity—this despite the fact that Mr. Hoey's affidavit indicates that he gave no assurances that Taliento would not be prosecuted even if he did testify but told him he "would have to rely on the good judgment and conscience of the Government" (A. 143-144). In short, whatever may have occurred in the 1966 conversation with Mr. Di Paola, these 1968 conferences erased any significance the earlier promise might have had. They made manifest that neither Taliento nor the lawyer who represented him was of the opinion at the time of the trial that Taliento was immune from prosecution. While Taliento and his lawyer may well have believed that the actual chances that Taliento would have to stand trial were slim if he cooperated, this was another matter altogether, and fully consistent with the statements at trial.

Against this background Taliento spoke honestly when he testified that there was "still a chance" he could be prosecuted, and that he "still could be in-

dicted" (A. 44, 50). And so did Mr. Golden when he stated to the jury in closing argument that in view of the events of the past week Taliento knew he could be indicted and "received no promises that he would not be indicted" (A. 119). As the district court pointed out, the United States Attorney—the officer with the dispositive authority in this regard—had made no promise of immunity and no complaint was made by Taliento or his counsel that the government was defaulting upon any previous promise.

No other conclusion makes sense in light of these pretrial events. Indeed, one may inquire why Taliento found it necessary to feign a memory loss if he, or his counsel, believed that the 1966 conversation with Mr. Di Paola represented a government promise of immunity.* In short, viewing this record in its entirety, it is our submission that the questions which petitioner advances are not actually posed: (1) whether knowledge of an informal promise of immunity made by one Assistant United States Attorney must be imputed to another, and (2) if so, whether uncontradicted false testimony by a crucial witness that no such promise was made establishes such misconduct by the government that a new trial would be warranted.

We emphasize that if, in fact, an Assistant United States Attorney, to the understanding of all parties,

---

* It is true that this memory lapse was coupled with the statement of his father that "I would rather have my boy alive than have him testify and be killed" (A. 140). But his father was unable to pinpoint the basis of this fear (A. 140); "it was an indefinite fear—nothing else" (A. 143).

gives a firm promise of immunity, the government would honor that promise, whether or not legally obligated to do so. Our position in the case at hand is simply that no binding promise was made and that Taliento therefore did not misrepresent the situation in his testimony at the trial. Thus, there could not have been any prosecutorial misconduct in allowing him to testify as he did.

We have no reason to doubt, however, that if Mr. DiPaola in fact made a promise to Taliento in 1966,[7] that promise was not known to petitioner or his counsel at the trial. Thus, apart from any question of possible prosecutorial misconduct, there remains the question whether the subsequent revelation of such a promise would otherwise warrant a new trial on the basis of newly discovered evidence under F.R.Crim. P. 33. Accordingly, in the next section we discuss the applicable new trial standards, concluding that such relief would be appropriate only if Mr. DiPaola's statement would likely have led to acquittal if admitted at trial, something that would plainly not have occurred in the circumstances of this case.

---

[7] We assume *arguendo* in this brief that Mr. DiPaola's 1969 affidavit (A. 136-137) accurately reflects what he told Taliento in 1966. We note, however, that there is other evidence suggesting that Mr. DiPaola's recollection may not be completely accurate. Mr. Golden's recollection of what Mr. DiPaola told him about the matter in 1968 differs substantially (see A. 139-140). Moreover, at the outset of Taliento's testimony before the grand jury on September 20, 1966, Mr. DiPaola advised him of his Fifth Amendment privilege of silence, pointing out that if he testified he "could become a prospective defendant" in a subsequent criminal case (see Grand Jury Transcript, pp. 13-15). Thus, even if

B. The 1966 promise—assuming there was one—was not sufficiently material to call for a new trial.

We begin with an outline of the criteria that this Court and the courts of appeals have developed for evaluating new trial claims based on newly discovered evidence under the various types of circumstances that may arise. The categories tend to overlap and no exhaustive analysis is intended. Our purpose is simply to set forth the basic considerations in order to determine the principles that should govern here.

1. A new trial is clearly in order in cases of blatant and deliberate use by the state of false substantive evidence (*e.g.*, *Mooney* v. *Holohan*, 294 U.S. 103, 112) or in cases where a principal state witness testifies falsely, with the knowledge of the prosecutor and no correction by him. (*e.g.*, *Napue* v. *Illinois*, 360 U.S. 264). The focus of these and related decisions in large measure is upon prosecutorial misconduct. Accordingly, even where no perjured testimony is actually introduced purposeful suppression of highly relevant evidence would justify a new trial. The greater the showing of prosecutorial misconduct the less need be the showing of materiality of the suppressed evidence. See *United States* v. *Bonnano*, 430 F. 2d 1060, 1063 (C.A. 2), and cases there cited. This is so because " '[t]he administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach.' " *Kyle* v. *United*

---

the failure to reveal such a promise under all the circumstances were regarded as prosecutorial misconduct, a further hearing would be required to determine if such a promise was actually made in 1966.

States, 297 F. 2d 507, 514 (C.A. 2). And where the prosecutor lends himself to perjury "[t]he court must combat this threat to its own dignity and to the dignity of the criminal system or risk the possibility that the community will lose faith in the entire criminal process." Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 Yale L. J. 136, 138 (1964). The instant case is not encompassed by this rationale, since there was neither perjurious testimony nor purposeful suppression of evidence by the prosecutor.

There is a related category of cases in which a new trial would be in order "irrespective of the good faith or bad faith of the prosecution" because, despite a general defense request, highly relevant material has not been disclosed. *Brady* v. *Maryland*, 373 U.S. 83, 87, is the exemplar. That was a murder case, where a companion of the defendant had made a pretrial statement admitting the actual slaying which had not been disclosed to the defense. In that context, this Court held (373 U.S. at 87) that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The *Brady* principle also does not control here, since—we shall elaborate—no "material" evidence was suppressed by the government knowingly or otherwise and it cannot be said that the failure to disclose Di Paola's promise impaired the defendant's ability to prepare for trial, see *United States* v. *Polisi*, 416 F. 2d 573, 577 (C.A. 2). Moreover, there

was here no general request by the defense for such evidence.

This case is not comparable to one where a material promise made by one Assistant United States Attorney was contained in writing in the government's file although apparently not known to the prosecutor who actually tried the case.[8] There is no contention here that Di Paola's promise was even reduced to writing, much less that it was contained in the government file.

The most that can be said in this case is that at a time long before trial an Assistant United States Attorney who had nothing to do with the actual trial itself apparently made a representation which, as a consequence of later superseding events, had no ultimate significance. In such circumstances, it is proper to conclude as did Judge Friendly in *United States* v. *Keogh*, 391 F.2d 138, 148 (C.A. 2) (albeit in a somewhat different context) that "the problems of the courts and the wider interests of society unite to require a substantially higher probability that disclosure of the defense would have altered the result. To invalidate a conviction in such cases because a comb-

---

[8] See *Hawkins* v. *United States*, 324 F. 2d 873 (C.A. 5), where there was a written representation in the file to the effect that the cooperation of two self-confessed accomplices in testifying against the defendant would be considered by the trial court. The Fifth Circuit found that when these key witnesses testified that no promises had been made for their testimony the government had to be charged with knowledge that their testimony was false even though the prosecutor who tried the case had not made the promise. See 324 F. 2d at 878.

ing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict would create unbearable burdens and uncertainties."

2. The applicable principle, therefore, is the traditional one requiring a new trial only if the newly discovered evidence can be shown to be "material and of some substantial use to the defendant." *United States* v. *Tomaiolo*, 378 F. 2d 26, 28 (C.A. 2). Although this Court has not ruled on standards of materiality "and the degree of prejudice which must be shown to make necessary a new trial." *Giles* v. *Maryland*, 386 U.S. 66, 74 (opinion of Mr. Justice Brennan), the rule applied in most circuits is that the evidence must be of such quality as would likely have produced an acquittal if it had been admitted at trial.[9] That is, we submit, the appropriate rule.

In this case, the trial judge found that it was "inconceivable [that] the result would or should be changed" by the new evidence (A. 152), and this ruling was affirmed by the court below without an opinion. The trial judge's conclusion as to the facts should not be upset unless such findings were "wholly

---

[9] *E.g.*, *United States* v. *Alexander*, 430 F. 2d 904, 906 (C.A.D.C.); *United States* v. *Cousins*, 429 F. 2d 1271, 1272 (C.A. 9), certiorari denied, 400 U.S. 904; *United States* v. *McWilliams*, 421 F. 2d 1083, 1085 (C.A. 8), certiorari denied, 397 U.S. 1070; *United States* v. *Perea*, 418 F. 2d 65, 69 (C.A. 10), certiorari denied, 397 U.S. 945; *United States* v. *Luxenberg*, 374 F. 2d 241, 251 (C.A. 6); *United States* v. *Faustin*, 371 F. 2d 820, 821 (C.A. 2), certiorari denied, 387 U.S. 935; *United States* v. *De Marie*, 261 F. 2d 477, 479 (C.A. 7).

unsupported by evidence." *United States* v. *Johnson*, 327 U.S. 106, 111; *United States ex rel. Fein* v. *Deegan*, 410 F. 2d 13, 17 (C.A. 2), certiorari denied, 395 U.S. 935. Petitioner can make no such showing here.

First, there was evidence at petitioner's trial to corroborate Taliento's testimony. There is no question that Taliento had an "appointment" with petitioner on the evening of July 5, 1966, before he agreed to help the F.B.I. (Tr. 185-186) and that when he met with petitioner that night, petitioner had a roll of money amounting to slightly less than Taliento's purported share ~~($500)~~ of the take on the money orders fraudulently cashed that day (Tr. 198-199). More significantly, Taliento had made two statements—one to the bank on July 5, 1966 (Tr. 192-193) and one to the F.B.I. on July 7, 1966 (Tr. 203-204)—which implicated petitioner and fully detailed the scheme. Since the first statement was made before the F.B.I. was even called, it cannot be claimed that Taliento's implication of petitioner was in any way based upon any promises made by any government agent. Indeed, Mr. Di Paola apparently made his promise, such as it was, sometime in September 1966, several months after Taliento's full confession to the F.B.I. in July. The force of these earlier statements directly implicating petitioner in the fraudulent scheme is therefore not affected by evidence of a subsequent promise of immunity. Furthermore, it cannot seriously be contended that the jury would have been influenced in its outcome if it had known of Di Paola's promise. It was directly brought out at trial that Taliento was not indicted and that he testified before the grand

jury basically to serve his own interests. Moreover, in closing argument defense counsel repeatedly hammered home the fact that Taliento had much to gain by placing the blame on petitioner. In this setting the jury could not be "so naive" (cf. *United States* v. *Davila*, 428 F. 2d 465, 467 (C.A. 9)) as to believe that Taliento—although honest in his testimony that he had not been promised immunity—did not expect the government to take his testimony into account in deciding whether to proceed further against him.

Di Paola's statement, in sum, did not contain any information that the defense could have put to any significant use and the motion for a new trial was properly denied.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals be affirmed.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

JEROME M. FEIT,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
CRAIG M. BRADLEY,
Attorneys.

MAY 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 425635 661